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KUALA LUMPUR KEPONG BHD v. PENTADBIR TANAH JAJAHAN TANAH MERAH & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
LINTON ALBERT JCA
B HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: D-01-132-04-2014]
26 MAY 2015

C ***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Challenging acquisition of land by State Authority – Whether State Authority must be made party to action – National Land Code, s. 16*

LAND LAW: *Acquisition of land – Acquisition by State Authority – Notification that acquisition for public purpose – Whether strict test applied – Criteria for acquisition for public purpose – Whether satisfied – Whether general public would*
D *benefit from acquisition*

WORDS & PHRASES: *'public purpose' – Acquisition of land – Criteria for acquisition for public purpose – Whether satisfied – Whether strict test applied*

The appellant's land was acquired by a government gazette and the purpose
E was said to be for public purpose. The appellant, contending that the purpose of the acquisition was not for public purpose, filed a judicial review application challenging the acquisition. The respondents did not object to the leave application for the judicial review. However, the respondents objected to the application proper on the grounds that the State Authority who made
F the decision in respect of the said acquisition was not made a party and in consequence, the judicial review application must be dismissed. The judicial review application was dismissed by the High Court Judge and hence, the appeal by the appellant.

Held (allowing appeal with no order as to costs)
G **Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:**

(1) Section 16 of the National Land Code does not require the State Authority to be named as a respondent to the judicial review application. In any event, in matters relating to judicial review and/or issues relating to constitutional, the courts should be slow in dismissing
H action on grounds that the right party was not named. The High Court should have directed the appellant to add the State Authority as a party to the suit. (para 12)

(2) Based on the gazette and the purpose the acquisition was declared to be
I made, the criteria for acquisition for public purpose was not satisfied. The general public will have no benefit from the said acquisition. The test for public purpose is a strict test and the respondents had failed to demonstrate that the acquisition was for public purpose. (para 12)

Bahasa Malaysia *Translation Of Headnotes*

Tanah perayu telah diperoleh melalui warta kerajaan dan tujuannya dikatakan untuk kegunaan umum. Perayu, dalam hujahannya, menyatakan bahawa tujuan pemerolehan bukan untuk faedah umum, memfailkan permohonan semakan kehakiman mencabar pemerolehan tersebut. Responden-responden tidak membantah permohonan kebenaran untuk semakan kehakiman. Walau bagaimanapun, responden-responden membantah permohonan itu sendiri atas alasan bahawa Pihak Berkuasa Negeri yang membuat keputusan berkaitan dengan pemerolehan tersebut tidak dijadikan pihak dan akibatnya permohonan semakan kehakiman tersebut mesti ditolak. Permohonan semakan kehakiman tersebut ditolak oleh Hakim Mahkamah Tinggi dan dengan itu, rayuan oleh perayu.

Diputuskan (membenarkan rayuan tanpa perintah untuk kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 16 Kanun Tanah Negara tidak memerlukan Pihak Berkuasa Negeri dinamakan sebagai responden bagi permohonan semakan kehakiman. Walau bagaimanapun, dalam perkara-perkara yang melibatkan semakan kehakiman dan/atau isu-isu berkaitan dengan perlembagaan, mahkamah tidak wajar campur tangan untuk menolak tindakan atas alasan bahawa pihak yang betul tidak dinamakan. Mahkamah Tinggi sepatutnya mengarahkan perayu menambahkan Pihak Berkuasa Negeri sebagai pihak kepada guaman tersebut.

(2) Berdasarkan warta tersebut dan tujuan pemerolehan seperti yang diisytiharkan, kriteria pemerolehan untuk kegunaan awam tidak dipenuhi. Masyarakat umum tidak akan memperoleh faedah daripada pemerolehan tersebut. Ujian untuk kegunaan awam adalah ketat dan responden-responden telah gagal menunjukkan bahawa pemerolehan tersebut adalah untuk kegunaan awam.

Case(s) referred to:

Ahmad Saman v. Kerajaan Negeri Kedah [2004] 1 CLJ 211 CA ***(refd)***

Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah & Ors [2007] 5 MLJ 441 ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (2) [1992] 2 CLJ 1140; [1992] 1 CLJ (Rep) 90 SC ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 1 LNS 14 FC ***(refd)***

S Kulasingam & Anor v. Commissioner of Land, Federal Territory & Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 FC ***(refd)***

Syed Omar Abdul Rahman Taha Alsagoff & Anor v. The Government of the State of Johore [1978] 1 LNS 190 PC ***(refd)***

Wang Su Sing v. Hj Zamari Hj Mohd Ramli & Ors [2014] 2 CLJ 257 HC ***(refd)***

Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA ***(refd)***

Legislation referred to:
Federal Constitution, art. 13(1)
Land Acquisition Act 1960, s. 3(1)
National Land Code, s. 16

For the appellant - Andrew Teh (Foong Mun Yee with him); M/s Wong Lu Peen & Tunku Alina
For the respondents - Nooriah Osman; State Legal Advisor, Kelantan

[Appeal from High Court, Kota Bharu; Judicial Review No: 25-10-10-2013]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellants appeal against the decision of learned High Court Judge who dismissed the judicial review application challenging the acquisition of land by the Kelantan State Director of Land and Mines (second respondent). We heard the appeal on 27 October 2014 and allowed the appeal. My learned brothers Mohd Hishamudin bin Mohd Yunus JCA and Linton Albert JCA have read the judgment and approved the same. This is our judgment.

[2] The prayers in the judicial review application read as follows:

> 1. Bahawa Pemohon diberikan kebenaran untuk memfailkan permohonan semakan Kehakiman di bawah Aturan 53 Kaedah-Kaedah Mahkamah, 2012 terhadap keputusan/tindakan/pengisytiharan Pihak Berkuasa Negeri Kelantan berkenaan pengambilan tanah melalui Warta Kerajaan Negeri Kelantan No. 1307 bertarikh 18 Jun 2013 yang disiarkan pada 18 Julai 2013 yang memohon untuk relif-relif berikut:
>
> (i) Satu Deklarasi bahawa pengambilan tanah yang dibuat oleh Pihak Berkuasa Negeri Kelantan melalui Warta Kerajaan Negeri Kelantan No. 1307 bertarikh 18 Jun 2013 yang disiarkan pada 18 Julai 2013 tidak menurut seksyen 3 Akta Pengambilan Tanah 1960;
>
> (ii) Satu Deklarasi bahawa perisytiharan pengambilan tanah yang dicadangkan yang dibuat oleh Pengarah Tanah dan Galian Negeri Kelantan bagi pihak Pihak Berkuasa Negeri Kelantan melalui Warta Kerajaan Negeri Kelantan No. 1307 itu adalah tidak sah dan terbatal;
>
> (iii) Satu Deklarasi bahawa pengambilan dan perisytiharan pengambilan tanah yang dicadangkan yang dibuat oleh Pengarah Tanah dan Galian Negeri Kelantan bagi pihak Pihak Berkuasa Negeri Kelantan melalui Warta Kerajaan Negeri Kelantan No. 1307 itu adalah melanggar Artikel 13(1) Perlembagaan Persekutuan.

(iv) Suatu Perintah *Certiorari* untuk membatalkan keputusan Pihak Berkuasa Negeri Kelantan berkenaan untuk pengambilan tanah yang dibuat melalui Warta Kerajaan Negeri Kelantan No. 1307 itu;

(v) Satu Deklarasi bahawa Borang E dan Borang F yang masing-masing bertarikh 26 Ogos 2013 dan berkenaan pengambilan tanah itu adalah tidak sah dan terbatal;

(vi) Suatu Perintah *Certiorari* untuk membatalkan Borang E dan Borang F bertarikh 26 Ogos 2013 yang dikeluarkan oleh Pentadbir Tanah Jajahan Tanah Merah, Negeri Kelantan.

2. Prosiding siasatan dan atau penentuan amaun pampasan kepada orang yang berkepentingan, termasuk Pemohon, berkenaan pengambilan tanah itu digantungkan sehingga pelupusan semakan Kehakiman ke atas pengambilan tanah itu (sekiranya kebenaran Mahkamah adalah diperolehi).

3. Kos dalam kausa;

4. Perintah yang lain dan yang lanjut yang mana difikirkan suaimanfaat oleh Mahkamah yang mulia ini.

[3] The appellant's land was acquired by a Government gazette issued on 18 July 2013 through the Government Gazette No. 1307 dated 18 June 2013. The purpose was said to be public purpose; but the appellant contends otherwise. The purpose for the acquisition was stated as follows:

Pengisytiharan Pengambilan Yang Dicadangkan

Adalah dengan ini diisytiharkan bahawa tanah-tanah dan kawasan-kawasan yang tertentu yang dinyatakan dalam jadual di bawah ini adalah dikehendaki bagi maksud yang berikut:

Pengambilan Balik Tanah Bagi Maksud Tapak Penempatan Rumah Pekerja Ladang Kerilla Di atas Sebahagian Tanah Lot 2458, GRN 19801, Mukim Kuala Paku, Jajahan Tanah Merah.

[4] In the present case, at the High Court, the respondents did not object to the leave application for the judicial review application. However, the respondents objected to the application proper on the grounds that the State Authority who made the decision in respect of the said acquisition was not made a party and in consequence the judicial review application must be dismissed. The learned trial judge heard the objection as well as the merit and dismissed the judicial review application on two grounds namely: (i) State Authority must have been made a party; (ii) The acquisition was for a public purpose literally. The respondents relied on the definition of 'public purpose' as stated by the High Court in the case of *S. Kulasingam & Anor v. Commissioner of Land, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314; [1982] 1 MLJ 204. In the case cited, Hashim Yeop Sani J (as he then was) who had this to say:

> The expression "public purpose" is incapable of a precise definition. No one in fact has attempted to define it successfully. What all the textbooks have done is to suggest the tests to be applied in determining whether a purpose is a public purpose. Various tests have been suggested. But in my view it is still best to employ a simple common sense test, that is, to see whether the purpose serves the general interest of the community.

[5] What is important to note is that the view expressed by the High Court in *S Kulasingam*'s that "to see whether the purpose serves the general interest of the community" has been the foundation for many of the subsequent judgments which had dealt with the meaning of 'public purpose'. That is to say 'general interest of the community' necessarily means the public and not a group of persons. For example, land may not be acquired to give to a group of squatters but land may be acquired to give housing benefits to squatters as a whole. When land is acquired for a group of squatters it cannot be said to be for a 'public purpose' from the definition gleaned from a number of cases. It also depends on the facts and circumstances as well as the *bona fide* of the acquisition. We will elaborate further in the judgment.

Jurisprudence Relating To Public Purpose And The Federal Constitution

[6] There are a number of cases which had attempted to define 'public purpose' though there are no statutory parameters for the definition. In *Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah & Ors* [2007] 5 MLJ 441, Hamid Sultan Abu Backer JC (as he then was), having considered the relevant cases namely: (i) *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v. The Government of the State of Johore* [1978] 1 LNS 190; [1979] 1 MLJ 49 (PC); (ii) *S. Kulasingam & Anor v. Commissioner of Land, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314; [1982] 1 MLJ 204; (iii) *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang & Ong Gaik Kee* [1983] 1 LNS 14; [1983] 2 MLJ 35 (FC); (iv) *Ahmad Saman v. Kerajaan Negeri Kedah* [2004] 1 CLJ 211; [2003] 4 MLJ 705 (CA), held:

> (c) The applicant's puny arguments that it is not for public purpose, relying on s. 3 LAO to be read with s. 2, does not replicate the object and intent of the legislature. Public purpose is statutorily defined in s. 2, and it is not a comprehensive definition and it also does not encompass all heads of public purpose. It only attempts to set out what may amount to public purpose. Public purpose in s. 2 in my view appears to be like a generic term and the species are set out in the definition as far as possible. Further, public purpose or use or benefit will necessarily include living persons, statutory bodies etc, which may obtain a benefit as any ordinary member of the public could have done. For example, electricity is necessary for the purpose of lighting the house as well as a factory belonging to a corporation. Both purposes whether house or factory must necessarily be seen as public purpose as it benefits the public. Thus, the final test for public purpose is that whether directly or indirectly

> the public benefits. For example, land cannot be acquired under s. 3 LAO for the purpose of presenting to an individual person. Such an act will not pass the public purpose test, unless otherwise provided by the law. The public purpose test has been eloquently set out by Hashim Yeop A Sani J (as he then was) in *S Kulasingam* as 'whether the purpose serves the general interest of the community'. To this I will add that as long as the public directly or indirectly benefits from the decision made under s. 3 in this case, public purpose criteria is deemed to have been satisfied, unless the facts warrant otherwise. It cannot by any stretch of imagination be argued that the ultimate user of electricity in this case is not the public. In consequence, I am inclined to accept the arguments of the respondents so much as it relates to public purpose, but I decline to accept the arguments that the conclusive evidence clause in s. 3 is binding on the courts.

[7] Similar sentiments were expressed by Lee Swee Seng JC (as he then was) in the case of *Wang Su Sing v. Hj Zamari Hj Mohd Ramli & Ors* [2014] 2 CLJ 257, where on the facts it was held:

> (2) A noble purpose does not necessarily convert into 'public purpose' and public benefit cannot be equated to a 'public purpose'. The class of persons being squatters on the subject land could not be for 'public purpose' as it only benefited that class of persons. Thus, the state, by legitimising the occupation of the subject land by the squatters to that of lawful occupiers could only be said to have benefitted tangibly the squatters already on the subject land and not the public as a whole, irrespective of the size of the group of people.

[8] We wish to emphasise here that it is for the respondent to establish that the land was acquired for public purpose or for any of the grounds stated in s. 3(1) of the Land Acquisition Act 1960 in order to satisfy art. 13(1) of the Federal Constitution which states:

> 13(1) No person shall be deprived of property save in accordance with law.

[9] Failure to satisfy that the land was acquired for public purpose would entail the court to squash the decision of the respondents on the grounds of illegality, irrationality as well as procedural impropriety. Support for the proposition is found in a number of cases. In *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang & Ong Gaik Kee* [1983] 1 LNS 14; [1983] 2 MLJ 35, the Federal Court had this to say:

> We think that it is sufficient to decide this appeal on the basis of a simpler question, ie, whether or not in view of the long delay resulting in an injustice to the land owner the acquisition was done in accordance with the Act (the Land Acquisition Act). Only in the circumstance that it is not done in accordance with the Act can we say that the acquisition is contrary to the requirement of clause (1) of Article 13 of the Federal Constitution which requires that to be lawful every deprivation of property must be done in accordance with law.

A Every exercise of statutory power must not only be in conformity with the express words of the Statute but above all must also comply with certain implied legal requirements. The court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness (*de Smith*'s (4th B Ed) p 323; and *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*).

Brief Facts

[10] The Malaysian Indian Congress, Division of Tanah Merah wrote to C the Ministry of Human Resources requesting to look into the housing and accommodation affairs of the retired estate workers of an estate known as 'Kerilla Estate'. The appellant owned the land on which the estate is situated. Subsequently, steps were taken to acquire the land in dispute. Learned counsel for the appellant in support of the appeal submits as follows:

D 5.3 Though the Federal Court had in *S. Kulasingam* held that the expression of "public purposes" is incapable of precise definition, one can employ the common sense test and or look at the previous reported authorities to find guidance of "public purpose".

5.4 Applying the common sense test, it is submitted that the said E acquisition does not fulfil the provision of "public purpose" for the following reasons:

5.4.1 The Scheduled Land is situated in Kerilla Estate which is an ongoing plantation estate which is being cultivated and managed by the Appellant.

F 5.4.2 Being the owner of Kerilla Estate, the Appellant has been and is providing housing accommodation to its estate workers. At all material times, no contention was made that there are insufficient housing accommodation provided by the Appellant.

5.4.3 In the circumstance, it is submitted that on the face of the matter, the acquisition for "tapak penempatan rumah" workers G of Kerilla Estate cannot and does not fulfil a public purpose.

5.4.4 It is submitted that "Kerilla Estate workers" cannot and does not amount to "public" in the spirit of section 3 of the Act. The Kerilla Estate workers is a very narrowly, specifically defined section of the community.

H

5.4.5 Given that, it is submitted that the declaration of "housing accommodation for Kerilla Estate workers" does not serve any general interest to the public and cannot be said to be of public purpose.

I **[11]** In our judgment, the learned Federal Counsel, with respect, had failed to convince us in his submission that the land was in fact and law acquired for a public purpose, considering it is an undisputed fact that the land was acquired for retired estate workers of a private estate.

[12] We have read the appeal record and the able submission of the counsel as well as Senior Federal Counsel. After much consideration to the submission of the respondents, we take the view the appeal must be allowed. Our reasons *inter alia* are as follows:

(i) section 16 of the National Land Code (NLC 1965) does not require the State Authority to be named as a respondent to the judicial review application. The said section reads as follows:

> **16. Actions by and against the State Authority.**
>
> (1) The State Director may, on behalf of the State Authority, commence, prosecute and carry on in the name of his office any action, suit or other proceeding relating to:
>
> (a) State land;
>
> (b) any contract concerning land to which the State Authority is a party;
>
> (c) any trespass to, or other wrong committed in respect of, land;
>
> (d) the recovery of any item of land revenue, or any instalment thereof; or
>
> (e) the recovery of any fine, or the enforcement of any penalty, under this Act.
>
> (2) Any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the State Director in the name of his office.
>
> (3) In any action, suit or other proceeding to which this section applies, the State Director may appear personally, or may be represented by any advocate and solicitor, any Federal Counsel, the State's Legal Adviser or any Land Administrator or other officer appointed under sub-section (1) of section 12.

(ii) even on the supposition that we are wrong on the construction of s. 16 of NLC 1965, we take the view the High Court should have directed the appellant to add the State Authority as a party to the suit. (See *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666). In matters relating to judicial review and/or issues relating to constitutional issues, the courts should be slow to dismiss an action on the grounds that the right party was not named; more so when the respondent as well as the putative respondent will be represented by the Attorney General Chambers. The Attorney General Chambers should be the last to object and ought to have sought direction from the court to add the State Authority if they deem it fit. Support for the proposition

A and jurisprudence is found in a number of Indian cases. In *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor (2)* [1992] 2 CLJ 1140; [1992] 1 CLJ (Rep) 90, Edgar Joseph Jr. SCJ in reliance of the Privy Council decision observed as follows:

> In this context, I consider the following passage in the judgment
B of Viscount Radcliffe, speaking for the Privy Council in *Ibeneweka v. Egbuna* [1964] 1 WLR 219, 266 to be apt:
>
> > ... there had never been any unqualified rule of practice that forbade the making of a declaration even when some of the persons interested in the subject of the declaration were not
C before the Court. Where, as here, the appellants had decided to make themselves the champions of the rights of those not represented – the Obosi people – and had fought the case on that basis, and where, as here, the trial Judge took the view that the interested parties not represented were in reality fighting the suit, so to say, from behind the
D hedge, there was no principle of law which disentitled the Judge from making a declaration of title in the respondents' favour.
>
> Having regard to the very exceptional circumstances to which I have directed attention, I consider that the learned Judge was not
E prevented from making the declarations prayed for, in the exercise of his discretion, notwithstanding the fact that two of the persons interested in the subject matter of the declarations were not before the Court.

(iii) in the instant case, reading the gazette and the purpose, the acquisition
F was declared to be made does not satisfy the criteria for acquisition for public purpose. The general public will have no benefit from the said acquisition, as adumbrated in the cases we have dealt with earlier. The test for public purpose is a strict test and the failure by the respondent in this case to demonstrate that the acquisition was for public purpose entails the appeal to be allowed and the prayers stated in the judicial
G review application to be granted.

[13] For reasons stated above, the appeal was allowed with no order as to costs. The order of High Court is set aside. The prayers in the judicial review application from (i) to (vi) are allowed.

H We hereby ordered so.

I